



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Number: **201124025**
Release Date: 6/17/2011

Date: 3/25/2011

UIL: 501.36-00

Contact Person:

Identification Number:

Contact Number:

Employer Identification Number:

Form Required To Be Filed:

Tax Years:

Dear :

This is our final determination that you do not qualify for exemption from Federal income tax as an organization described in Internal Revenue Code section 501(c)(3). Recently, we sent you a letter in response to your application that proposed an adverse determination. The letter explained the facts, law and rationale, and gave you 30 days to file a protest. Since we did not receive a protest within the requisite 30 days, the proposed adverse determination is now final.

Because you do not qualify for exemption as an organization described in Code section 501(c)(3), donors may not deduct contributions to you under Code section 170. You must file Federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file. File the returns in accordance with their instructions, and do not send them to this office. Failure to file the returns timely may result in a penalty.

We will make this letter and our proposed adverse determination letter available for public inspection under Code section 6110, after deleting certain identifying information. Please read the enclosed Notice 437, *Notice of Intention to Disclose*, and review the two attached letters that show our proposed deletions. If you disagree with our proposed deletions, follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

In accordance with Code section 6104(c), we will notify the appropriate State officials of our determination by sending them a copy of this final letter and the proposed adverse letter. You should contact your State officials if you have any questions about how this determination may affect your State responsibilities and requirements.

If you have any questions about this letter, please contact the person whose name and telephone number are shown in the heading of this letter. If you have any questions about your Federal income tax status and responsibilities, please contact IRS Customer Service at 1-800-829-1040 or the IRS Customer Service number for businesses, 1-800-829-4933. The IRS Customer Service number for people with hearing impairments is 1-800-829-4059.

Sincerely,

Lois Lerner
Director, Exempt Organizations

Enclosure
Notice 437
Redacted Proposed Adverse Determination Letter
Redacted Final Adverse Determination Letter



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Date: 1/7/2011

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

LEGEND:

B = State
C = Date
D = Fundraising Program 1
F = Fundraising Program 2
G = Name of Officer 1
H = Name of Officer 2
J = Name of Officer 3
K = Name of University

UIL:

501.36-00

Dear :

We have considered your application for recognition of exemption from Federal income tax under Internal Revenue Code section 501(a). Based on the information provided, we have concluded that you do not qualify for exemption under Code section 501(c)(3). The basis for our conclusion is set forth below.

Issue

Do you meet the operational test under section 501(c)(3) of the Code? No, for the reasons explained below.

Facts

You are incorporated in the state of B as of C (date). The Articles of Incorporation indicate you are organized exclusively for purposes which are exempt under section 501(c)(3) of the Internal Revenue Code.

The narrative that you submitted as a part of your Form 1023, Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code, provided more detail on the

Letter 4036 (CG) (11-2005)
Catalog Number 47630W

activities you will undertake. Your programs are focused on providing fundraising services for unrelated collegiate athletic programs throughout the United States.

You will have two programs for fundraising and both will be web-based.

The first program will be the D. D will require the participation of two or more schools with the alumni, fans and supporters of the college athletic programs competing to determine which group of fans can raise the most amount of money (by collecting online donations) over a set time period. At the end of the competition, the schools will be paid by check within 30 days, minus your fees which are projected to cover your transaction and administrative costs. For D, you will charge 12% of all funds raised.

The second program will be the E. E will allow the administrators of college athletic departments to post a particular fundraising project or cause on your website. The details of the school's project or cause will be displayed on a dedicated page and will include the dollar amount needed to successfully fund the project. The dollar amounts will include the administrative fees you will charge. You will also be responsible for the cause fulfillment under this program. For example, if the cause is purchasing new computers, once the funds are achieved, you will purchase the computers and distribute them to the school. For E, you will charge 25% of the fees raised.

Both of the services will provide the online users, both donors to the college athletic programs and persons related to the cause, with real time results. This way they will be able to monitor the amount of donations that have been accepted and how close the school is to reaching the fundraising goals.

The two fundraising programs will be promoted over the internet mainly. The main strategy will utilize virtual fundraising techniques that will focus on generating new website visitors. These techniques include social networking, blogging, search engine marketing, email marketing and podcasting.

You indicated that a key component to your fundraising strategy will be securing contacts and authorizations from athletic directors and administrators to raise funds on their behalf. To accomplish this, you will contact the appropriate authorities of school programs that you feel could benefit greatly from the services you offer. The primary selling point that you will use in these contacts is that there are no upfront fees associated to either of the programs. Thus, there is no financial risk to the program's operations and any funds collected (less fees) on their behalf will be paid to them in a timely manner. Once other athletic programs are aware of your offerings, you feel that you will receive unsolicited fundraising requests.

In addition to the above mentioned fees to cover your costs for producing your fundraising services to the college athletic programs, your application also stated that you will seek corporate sponsorships.

You will be governed by G as Chief Executive Officer, H as Chief Project Development Officer and J as Chief Legal Officer. Each of your officers will receive compensation of \$ 21,000 from you for the first year of operations. The compensation amounts will increase to more than \$

102,000 per member in the second year and will continue to rise over time. You indicated that this is due to the fact that the first year projections for revenue are conservative and as the revenues increase, so will the time commitments of your officers.

Your financial statements reflect your sole source of income to be gifts, grants and contributions. However, your description of activities and operations reflect fees for services to the unrelated college athletic programs as your primary source of income. You will be collecting donations on behalf of your clients, and you will retain the fees that you charge your clients to perform the fundraising services. Including the donations that you will collect on behalf of your clients as if they were your own, you project over \$ 3 million in income your first year and an increase to more than \$ 15 million by year three.

You have already entered into a contract with K University. K University chose your E program. K University entered into the contract to secure computers for their athletic department. The contract began on August 21, 2009 and does not end until the goal is reached. The contract showed that your fundraising fee was included in the amount requested in donations (goal) from the general public.

Law

Section 501(c)(3) of the Code provides, in part, for the exemption from Federal income tax of:

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment)..."

Income Tax Regulation § 1.501(c)(3)-1(a)(1) states:

"In order to be exempt as an organization described in section 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational test or the operational test, it is not exempt."

In Revenue Ruling 69-528, 1969-2 CB 127, an organization that was regularly carrying out an investment service business that would be an unrelated trade or business if carried on by any exempt organization on whose behalf the organization operated, was not found to be exempt under section 501(c)(3).

In Revenue Ruling 71-529, 1971-2 CB 234, a nonprofit organization that provided assistance in the management of participating colleges' and universities' endowment or investment funds for a charge substantially below cost qualified for exemption under section 501(c)(3) of the Code. [Revenue Ruling 69-528, distinguished]

In Revenue Ruling 72-369, 1972-2 CB 245, an organization that was formed to provide managerial and consulting services at cost to unrelated exempt organizations was not found to

be exempt under section 501(c)(3). [Revenue Ruling 71-529, distinguished]

In Better Business Bureau of Washington D.C., Inc. v. United States, 326 U.S. 279 (1945), the Supreme Court held that the presence of a single non-exempt purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly exempt purposes. The Court found that a trade association had an "underlying commercial motive" that distinguished its educational program from that carried out by a university.

In B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978), the court found that a corporation formed to provide consulting services was not exempt under section 501(c)(3) because its activities constituted the conduct of a trade or business that was ordinarily carried on by commercial ventures organized for profit. Its primary purpose was not charitable, educational, nor scientific, but rather commercial. In addition, the court found that the organization's financing did not resemble that of the typical 501(c)(3) organizations. It had not solicited, nor had it received, voluntary contributions from the public. Its only source of income was from fees from services, and those fees were set high enough to recoup all projected costs and to produce a profit. Moreover, it did not appear that the corporation ever planned to charge a fee less than "cost." And finally, the corporation did not limit its clientele to organizations that were section 501(c)(3) exempt organizations.

In Easter House v. U.S., 12 Cl. Ct. 476 (1987), aff'd in an unpub. opinion, 846 F.2d 78 (Fed. Cir. 1988), cert. den., 488 U.S. 907 (1988), the organization in exchange for a fee, provided adoption services to parents seeking to adopt a child, including services to pregnant women who intended to place their newborns for adoption. These fees were the organization's sole source of income. The Claims Court concluded that the organization's business purpose of operating an adoption service, not the advancement of educational and charitable activities, was its primary goal. It competed with other commercial organizations providing similar services. Thus, "[p]laintiff's competition provides its activities with a commercial hue." 12 Cl. Ct. at 486. Accordingly, the organization did not qualify for exemption under section 501(c)(3) of the Code.

In Airlie v. I.R.S., 283 F. Supp. 2d 58 (D.D.C 2003) the District Court found that the organization was formed principally to organize, host, conduct and sponsor educational and other charitable functions at its facilities. The organization's patrons were not limited to tax exempt entities, but included patrons of a private and corporate nature. The organization paid significant advertising and promotional expenses and derived substantial income from weddings and special events held at its conference center. The court determined that the organization's activities competed with a number of commercial, as well as non-commercial entities, which strongly evidenced a commercial nature and purpose. The court concluded that although the organization carried out a number of charitable and educational activities, these were incidental to its primary activity of operating a for-profit conference center.

Application of Law

You do not qualify for exemption under section 501(c)(3) of the Code because you are not operated exclusively for any of the purposes described in section 501(c)(3).

You are not described as exempt according to the Income Tax Regulations because you fail the

operational test.

You are similar to the organization described in Revenue Ruling 69-528, *supra*, because you too are carrying on a business that would be an unrelated trade or business if carried on by any of the unrelated tax exempt organizations who are your clients. Some of the hallmarks of your commerciality are the facts that you will aggressively market your fundraising services to unrelated college athletic programs nationwide, your fundraising services will be regularly carried on, and you will charge fees for your fundraising services that will be designed to recover your own costs of producing the fundraising services.

You are similar to the nonexempt organization in Revenue Ruling 72-369, *supra*, because you will provide a commercial type service, specifically fundraising, to unrelated tax exempt organizations nationwide, you will use a commercial fee structure and you will exhibit the other hallmarks of commerciality noted above. You will not provide these commercial services at a rate substantially below your own costs like the approved organization in Revenue Ruling 71-529, *supra*. This means that your operations are similar to a service that is regularly carried on as a trade or business which is commercial in nature.

Like *Airlie*, *supra*, your primary activity is operating a commercial business. You will compete with other commercial fundraising organizations that do business with unrelated tax exempt organizations and you will charge fees to your clients on a percentage of funds raised basis. Like other commercial fundraisers, you will aggressively market your services to your target clientele.

Like *B.S. W. Group*, *supra*, and *Easter House*, *supra*, (as well as the *Airlie*), the fees that you will charge to your clients, the unrelated tax exempt organizations nationwide, will not be set at substantially below your own costs to produce your fundraising services. Further, like *Easter House*, *supra*, you will rely significantly on paid employees, including paying salaries to your own officers. As mentioned above, another hallmark of commerciality is your marketing campaign that is designed to expand your clientele amongst unrelated college athletic programs across the nation.

Like *Better Business Bureau*, *supra*, you too have a substantial non-exempt purpose. The facts show that your operations will be carried on in a commercial manner. Simply providing a medium where your unrelated tax exempt clients across the nation can solicit donations in exchange for a substantial fee that they will pay to you, or that you will retain from them, lacks a donative element and does not constitute a separate tax exempt activity in its own right.

Applicant's Position

It is your contention that your programs, which raise funds for unrelated collegiate athletic programs nationwide, are exempt in nature. You submitted additional examples of how each of your fundraising programs will work. You stated you are nearly identical or very similar to other organizations. However, in one example, you stated that a distinction between you and the other entity is that your fee is not optional. In another example, you noted the distinction that the other entity deducted only 3% from each donation. In your third and final example, you noted the distinction that a separate for-profit corporation actually managed the website and marketed

the fundraising campaigns.

Service Response to Applicant's Position

The additional examples of your programs continue to show the hallmarks of commerciality. You will provide your fundraising services to your unrelated tax exempt clients in exchange for fees that are designed to cover your costs to produce those services. Based on an analysis of the facts that pertain specifically to your own unique case, your operations are commercial in nature and therefore do not qualify for exemption under IRC 501(c)(3) of the Code.

The individual facts of each application for a determination of exempt status must be weighed against the pertinent law and other precedents independently. However, it is important to note that the differences between you and the examples you describe are significant. The percentage rate you charge is significantly more and the manner in which you manage and market your fundraising services are different. Combined, these facts illustrate the commerciality of your operations.

Conclusion

Based on the above facts and legal analysis, we conclude that you fail to meet the operational test of section 501(c)(3) of the Code because you are operated in a commercial manner.

You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination. If your statement does not provide a basis to reconsider our determination, we will forward your case to our Appeals Office. You can find more information about the role of the Appeals Office in Publication 892, *Exempt Organization Appeal Procedures for Unagreed Issues*.

An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you during the appeal process. If you want representation during the appeal process, you must file a proper power of attorney, Form 2848, *Power of Attorney and Declaration of Representative*, if you have not already done so. You can find more information about representation in Publication 947, *Practice Before the IRS and Power of Attorney*. All forms and publications mentioned in this letter can be found at www.irs.gov, Forms and Publications.

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to appeal as a failure to exhaust available administrative remedies. Code section 7428(b)(2) provides, in part, that a declaratory judgment or decree shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted all of the administrative remedies available to it within the IRS.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

Please send your protest statement, Form 2848, and any supporting documents to the applicable address:

Mail to:

Internal Revenue Service
EO Determinations Quality Assurance
Room 7-008
P.O. Box 2508
Cincinnati, OH 45201

Deliver to:

Internal Revenue Service
EO Determinations Quality Assurance
550 Main Street, Room 7-008
Cincinnati, OH 45202

You may fax your statement using the fax number shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he or she received your fax.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

Rob Choi
Director, Exempt Organizations
Rulings & Agreements

Enclosure, Publication 892